

1 U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA M. MILLER and U.S. POSTAL SERVICE,  
POST OFFICE, Southeastern, Pa.

*Docket No. 97-1400; Submitted on the Record;  
Issued March 25, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 5, 1995, on the grounds that she refused an offer of suitable work.

The Office accepted that appellant sustained lumbosacral strain and a herniated nucleus pulposus at L4-5 on January 19, 1986, and it placed her on the periodic roll for receipt of compensation. She returned to part-time light-duty work intermittently thereafter but was unable to sustain employment.

On February 25, 1989 Dr. David L. Willner, a Board-certified orthopedic surgeon, reviewed appellant's history and her present complaints, examined her, and opined:

"In her present condition, I would have to consider [appellant] to be physically unfit to return to her previous job as a mailhandler; and I doubt that she could even perform light duties or limited hours at the present time, in her present condition."

Dr. Willner thereafter noted that, when reviewing appellant's records he came across an August 8, 1987 report from his own office, which, when compared to his present report, suggested that appellant's condition had worsened somewhat over the previous year and a half. He also completed a work restriction evaluation indicating that appellant could lift no more than 10 pounds, but could not work at all for an indefinite period.

In a February 28, 1992 report, Dr. Arnold Sokol, a Board-certified osteopathic family practitioner and appellant's treating physician, review her history and treatment, noted her ongoing symptomatology, and opined that appellant "has not shown any improvement and her condition appears to be chronic at this time." Dr. Sokol opined that appellant's condition was chronic, and "that she will have periods of exacerbation throughout her life."

A work restriction evaluation dated August 9, 1993 completed by Dr. Sokol noted that appellant could sit, stand and walk for 1 hour per day, lift no more than 10 pounds, and could only work 1 to 2 hours per day. He opined that appellant had not reached maximum medical improvement and that it was unknown when she would.

Medical progress notes from Dr. Sokol for the period October 19, 1993 through July 18, 1994 were also submitted which indicated that appellant continued to be treated for herniated disc-related lumbosacral pain during that period.

The Office then referred appellant, with a statement of accepted facts and the relevant records, to Dr. Roy M. Lerman, a Board-certified physiatrist,<sup>1</sup> for a second opinion evaluation. In a report dated August 1, 1994, he reviewed appellant's history, noted her present complaints, examined her, and opined that her subjective complaints were greater than what would be expected from her diagnosis and diagnostic studies, that her pain examination on hip rotation and her sensory examination of dermatomes had some inconsistencies, and that her severe restriction in range of motion nine<sup>2</sup> years post injury would be considered atypical. Dr. Lerman opined that appellant was most likely to continue to experience discogenic pain related to her injury, that she had reached maximum medical improvement, and that no other treatment was recommended at that time. He opined that appellant could not return to full duty but that she "should be able to work in a modified capacity."

Thereafter, Dr. Lerman submitted a September 26, 1994 form OWCP-5c entitled Musculoskeletal Conditions indicating that appellant should limit "bending, twisting, lifting," that specific restrictions were "lift 20 [pounds] occ[asionally] 10 [pounds] frequent[ly], bending occ[asionally], sitting [1] hour at a time, [4] hours max[imum] per day, standing [1] hour at a time, [4] hours max[imum] per day." He indicated that appellant could work eight hours per day, indicated that these restrictions were permanent, and opined that the date of maximum medical improvement was August 1, 1994.

The employing establishment offered appellant a position as a modified distribution clerk sorting letters and flats. The physical requirements for letter sorting entailed:

"Intermittent sitting/standing/reaching/walking. Duties may be performed seated or standing. Chair with back support may be acquired. Requires frequent lifting of letters and occasional lifting of trays which generally weigh 12 pounds - not to exceed 20 pounds."

Sorting flats required lifting 1 to 5 pounds frequently, not to exceed 20 pounds occasionally.

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<sup>1</sup> Physiatrics is a branch of physical medicine dealing with the diagnosis, treatment and prevention of disease with the aid of physical agents such as light, heat, cold, water and electricity; *see* Dorland's *Illustrated Medical Dictionary*, 27th Edition, p. 1291. The Board notes that in this case appellant was not in rehabilitation nor had she undergone rehabilitation and that a functional capacity evaluation had not been done.

<sup>2</sup> The Board notes that appellant was injured in 1986, making her 1994 examination only eight years post injury.

By letter dated May 23, 1995, the Office advised appellant that the offered position was suitable and was consistent with Dr. Lerman's restrictions, and it advised her of the provisions of 5 U.S.C. § 8106(c). It also advised her that she had 30 days within which to report for duty or to provide reasons why she could not.

Appellant did not return to work on May 12, 1995 as directed by the employing establishment.

On June 6, 1995 the Office received further medical evidence from appellant indicating that she was still being treated by Dr. Sokol for the period October 7, 1994 through May 8, 1995 for herniated disc-related lumbosacral pain radiating into her right leg.

By letter dated July 10, 1995, the Office advised appellant that the medical records received on June 6, 1995 were "not sufficient medical evidence to reject this job offer," and it gave appellant another 15 days within which to respond to the job offer.

By decision dated October 5, 1995, the Office suspended appellant's compensation finding that she had "abandoned suitable employment." The Office noted that it had determined that Dr. Lerman was the weight of the medical evidence because he had a statement of accepted facts, "all available medical evidence," and was a Board-certified physiatrist. The Office noted that appellant's physician was "a family doctor who has not provided a detailed narrative report advising current objective and/or neurological findings since 1992."<sup>3</sup>

By letters dated September 20 and 24, 1996, appellant, through her representative, requested reconsideration of the termination of her compensation, and in support submitted further medical evidence.

Reports dated January 24, May 1 and September 13, 1996 from Dr. Kevin A. Mansmann, a Board-certified orthopedic surgeon, indicated that appellant was experiencing an increase in low back pain with radiation down her right leg to her knee. He did not, however, comment on the suitability of the offered employment position, nor provide any opinions on disability.

A June 27, 1996 report from Dr. Samuel M. Puleo, a Board-certified orthopedic surgeon, noted appellant's history, reported her present symptoms and examination results, and opined that "at this point I do not feel that [appellant] is capable of working."

A September 25, 1996 report from Dr. Mansmann reviewed appellant's condition and addressed the suitability of the May 23, 1995 offered position, noting that "This job required 20 pounds of lifting and, strictly speaking, I would say that at that time she would have been unable to perform that job. This job would have had to be modified to be acceptable."

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<sup>3</sup> The Board notes that Dr. Sokol was Board-certified, that no medical narrative had been requested from him or from appellant, but that he had provided a work restriction evaluation and multiple medical progress notes since 1992 and up until the date of decision. Further, the Board notes that the record demonstrates that appellant's objective/neurological findings had not changed appreciably since the date of injury, as her L4-5 disc remained herniated.

Further medical treatment notes were also provided from Dr. Sokol which continued to report appellant's ongoing herniated disc-related lumbosacral pain problems.

By decision dated December 19, 1996, the Office denied modification of the termination decision finding that the evidence submitted in support was not sufficient to warrant modification. The Office found that Dr. Mansmann's reports, although not fully endorsing the offered job, supported that appellant could perform light duty. The Office did not address Dr. Puleo's report.

The Board finds that the termination of appellant's compensation must be reversed.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."<sup>4</sup> An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.<sup>5</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>6</sup> The Office did not meet that burden in this case.

In the instant case, the totality of the medical evidence of record prior to Dr. Lerman's report, and particularly Dr. Sokol's 1993 work restriction evaluation, specifically supported that appellant was unable to work even half a day. Dr. Sokol provided medical treatment notes up until the time of Dr. Lerman's examination which continued to indicate that appellant had ongoing herniated disc-related lumbosacral pain problems which had not changed or improved from her previously identified 1993 level of disability.

However, Dr. Lerman opined that appellant should be able to work in a modified capacity, and later specified restrictions on bending, twisting, and lifting, with lifting restricted to 10 pounds frequently and 20 pounds occasionally. He also indicated that appellant could sit for one hour at a time, four hours per day maximum and stand one hour at a time, four hours maximum per day, but could work for eight hours per day. He did not address appellant's ability to kneel, squat, reach, stretch, climb, carry or walk.

Clearly the opinion of Dr. Lerman was in conflict with the medical evidence submitted up to that date from Dr. Sokol on the issue of appellant's ability to work.<sup>7</sup>

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

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<sup>4</sup> 5 U.S.C. § 8106(c)(2) (1974).

<sup>5</sup> 20 C.F.R. § 10.124.

<sup>6</sup> See *Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

<sup>7</sup> The Board notes that since neither physician was Board certified in orthopedics, neurology or neurosurgery, neither physician's opinion merited a greater weight as being an expert in the appropriate field dealing with a herniated disc problem.

Therefore, in this case the Office should have referred appellant out to a third physician Board certified in orthopedics or neurosurgery, to resolve the conflict in medical opinion regarding appellant's continuing disability due to her herniated disc injury.

The Office, however, determined that Dr. Lerman's opinion constituted the weight of the medical evidence, and, relying on his incomplete work restriction evaluation, determined that the position offered appellant by the employing establishment, which included reaching and walking, two activities not addressed by Dr. Lerman, was suitable. The Office so advised appellant, and requested that she submit any evidence supporting why such position was not suitable.

In response appellant submitted further medical treatment notes from Dr. Sokol indicating that she was still being treated for herniated disc-related lumbosacral pain problems to the same extent she had previously been.

The Board notes that the Office's Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(4)(b) states:

"If the attending physician continues to state that the claimant should not perform the duties of the offered position, and a second opinion specialist states that claimant can in fact perform those duties, then a conflict in the medical evidence exists as to whether the position offered can be considered suitable."

In this case, neither the second opinion physician nor appellant's own treating physician were provided a copy of the specific job duties and physical requirements for the position offered appellant, and consequently neither could opine as to its suitability. However, as appellant submitted further medical evidence in support for her refusal of the offered position, and as appellant's physician supported continuing injury-related problems, in conflict with the second opinion physician's opinion, another conflict in medical evidence arose which required resolution by referral to an impartial medical examiner.

The Office, however, found that appellant had "abandoned suitable work," even though she had never accepted the position nor begun to work, and it terminated her compensation.

Thereafter, with a request for reconsideration, appellant submitted further rationalized medical evidence from two Board-certified orthopedic surgeons; one of whom opined that appellant was not capable of working, and the other of whom specifically addressed the physical requirements of the offered position and indicated that he felt appellant was unable to perform such a job.

Although the Office denied modification of the termination decision finding this further medical evidence insufficient, the Board finds that these reports also create a conflict with the report of the second opinion physician, which requires resolution.

As the Office did not establish both that appellant could work and that the offered position was suitable, due to a conflict in medical evidence, as the Office further improperly determined that subsequent medical evidence in support of appellant's job rejection was "not

sufficient medical evidence to reject this job offer,” and as the Office erroneously determined that further rationalized medical evidence from orthopedic surgeons which specifically addressed the issues in question “was not sufficient” to warrant modification, the Office has not met its burden of proof to terminate compensation in this case.

Accordingly, the decisions of the Office of Workers’ Compensation Programs dated December 19, 1996 and October 5, 1995 are hereby reversed.

Dated, Washington, D.C.  
March 25, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member